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In the Supreme Court of the United States

OCTOBER TERM, 1982

RONALD R. HUDSON,

Petitioner,

vs.

SUSAN HUDSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE SUPREME COURT OF INDIANA

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I. Question Presented for Review.

Petitioner (husband), a domiciliary of Oregon and a resident of Spain, was served with notice of Respondent's (wife) Indiana action for dissolution of marriage and determination of custody of the parties' children. Petitioner filed a special appearance in the Indiana trial court and moved to dismiss the action, as it pertained to custody and property matters, for lack of personal jurisdiction. The trial court held that it had jurisdiction to enter a decree on both the dissolution and the questions of custody and marital property. On appeal, the Court of Appeals of Indiana, Fourth District, held that while the Indiana trial court clearly did not have personal jurisdiction over the Petitioner, personal jurisdiction is not required in a child custody determination under the Uniform Child Custody Jurisdiction Act. Petitioner now asks this Court to review the decision that personal jurisdiction over the Petitioner, as required by the Fourteenth Amendment, is not necessary to render a child custody decree by the Indiana courts.

II. Parties Concerned.

The caption of this case in this Court contains the names of all parties to the proceeding in the Supreme Court of the State of Indiana.

III. TABLE OF CONTENTS

	PAGE
I. Question Presented for Review	i
II. Parties Concerned	i
III. Table of Contents	ii
IV. Table of Authorities	iv
A. Cases	iv
B. Statutes	iv
C. Constitutions	v
D. Periodicals and Books	v
E. Rules and Regulations	v
V. Citations of Opinions Below	1
VI. Jurisdictional Statement	2
VII. Constitutional Provisions, Statutes and Rules Involved	3
VIII. Statement of the Case	4
IX. Argument	8

X. Appendix

PAGE

A. Court of Appeals of Indiana Opinion A1

B. Judgment Sought to be Reviewed

1. Order of the Supreme Court of Indiana denying Petitioner's "Petition for Transfer" A26

2. Order of the Court of Appeals of Indiana denying Petitioner's "Petition for Rehearing" A27

3. Judgment of the Court of Appeals of Indiana (see X(A)) A1

4. Trial Court's Dissolution of Marriage Decree A28

C. Petitioner's Motion to Dismiss A30

D. Petitioner's Brief in Support of Motion to Dismiss A32

E. Trial Court's Order Overruling Petitioner's Motion to Dismiss A42

F. Petitioner's Motion to Correct Errors A43

G. Trial Court's Order Overruling Petitioner's Motion to Correct Errors A46

H. Petitioner's Petition for Transfer to the Indiana Supreme Court A47

IV. TABLE OF AUTHORITIES

A. *Cases*

PAGE

Goldfarb v. *Goldfarb*, 246 Ga. 24, 268 S.E.2d 648 (1980) 16

In re Marriage of Hudson, ... Ind.App. ....., 434 N.E.2d 107 (1982) 1

In re Marriage of Leonard, 122 Cal.App.3d 443, 175 Cal.Rptr. 903 (1981) 16

International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 10, 11, 14

Kulko v. *Superior Court of California*, 436 U.S. 84 (1978) 8, 13, 14

May v. *Anderson*, 345 U.S. 528 (1953) 8, 9, 10, 11, 12, 14

Pasqualone v. *Pasqualone*, 63 Ohio St.2d 96, 406 N.E. 2d 1121 (1980) 11, 12, 16

Pennoyer v. *Neff*, 95 U.S. 714 (1878) 11

Shaffer v. *Heitner*, 433 U.S. 186 (1977) 6, 8, 10, 11, 13, 14, 15

State ex rel Muirhead v. *District Court of First Judicial District*, 196 Mont. 535, 550 P.2d 1304 (1979) 16

B. *Statutes*

Title 28, U.S.C. Section 1257 2

Uniform Child Custody Jurisdiction Act, I.C. 31-1-1 11.6-1 *et seq.* 8

Uniform Child Custody Jurisdiction Act, I.C. 31-1-11.6-3 .....3, 15

C. *Constitutions*

PAGE

Fourteenth Amendment to United States Constitution 3

D. *Legal Periodicals and Books*

Bodenheimer and Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko* (1979), 12 U.S. DavisL.Rev. 229, 231, 237-239 14

Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 Family L.Q. 203, 204 15

E. *Rules and Regulations*

Indiana Rules of Appellate Procedure, Rule 2 2

Indiana Rules of Appellate Procedure, Rule 4 2

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PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE SUPREME COURT OF INDIANA

V. Citations of Opinions Below

There is no formal opinion of the Supreme Court of Indiana. That court's order of August 10, 1982, denying Petitioner's "Petition to Transfer" (App. p. 26) is unreported.

The opinion and judgment of the Court of Appeals of Indiana, Fourth District (by Presiding Judge Miller; concurred in by Judges Conover and Young) as issued April 21, 1982, which affirmed in part the judgment of the trial court, is reported at ..... Ind.App. ....., 434 N.E.2d 107

(1982) (App. p. 1). The Court of Appeals' order of May 26, 1982, denying Petitioner's "Petition for Rehearing" (App. p. 27) is unreported.

There is no formal opinion of the Vigo Superior Court, Division 2. That court's Dissolution of Marriage Decree (App. p. 28), dated July 15, 1980, is unreported.

VI. Jurisdictional Statement

Jurisdiction for Respondent's dissolution proceeding, filed before the Vigo Superior Court, Division 2, State of Indiana, as that jurisdiction pertains to child custody determination, is the issue which is sought to be reviewed in this petition. On July 15, 1980, the Vigo Superior Court entered its Dissolution of Marriage Decree (App. p. 28).

From this final order, Petitioner timely sought judicial review before the Court of Appeals of Indiana. Jurisdiction was present in Petitioner's appeal by virtue of Rule 2 and Rule 4, Indiana Rules of Appellate Procedure. On April 21, 1982, the Court of Appeals of Indiana, Fourth District, entered its opinion and judgment (App. p. 1). Petitioner thereupon filed his Petition for Rehearing with the Court of Appeals which was denied by order entered May 26, 1982 (App. p. 27).

Petitioner timely filed his Petition for Transfer to the Supreme Court of Indiana (App. p. 47), which petition was denied by unpublished order dated August 10, 1982 (App. p. 26). The result of this order was to affirm the Indiana trial court's decree as it pertained to custody of Petitioner's and Respondent's children, thereby constituting a final judgment rendered by the highest court of Indiana in which a decision could be had.

This petition for review on certiorari is being submitted to this Court pursuant to 28 U.S.C. Section 1257(3).

VII. Constitutional Provisions, Statutes and Rules Involved

The Fourteenth Amendment to the United States Constitution reads:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Uniform Child Custody Jurisdiction Act, Indiana Code 31-1-11.6-3 reads:

> Jurisdiction
>
> Sec. 3. Jurisdiction. (a) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (1) this state (A) is the home state of the child at the time of commencement of the proceeding, or (B) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
>
> (2) it is in the best interest of the child that a court of this state assume jurisdiction because (A) the child and his parents, or the child and at least one (1) contestant, have a significant connection with this state, and (B) there is available in this state substantial evidence concerning

the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this state and (A) the child has been abandoned or (B) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4)(A) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2) or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (B) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this state of the child, or of the child and one (1) of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(c) Physical presence of the child, while desirable, is not prerequisite for jurisdiction to determine his custody. *As added by Acts 1977, P.L. 305, Sec. 1.*

VIII. Statement of Case.

This case arose by the filing of Respondent's (hereinafter "Wife") verified petition for dissolution of marriage on March 12, 1980. This petition was filed before the Vigo Superior Court, Division 2, Terre Haute, Vigo County, Indiana.

The facts of this case reveal that Petitioner (hereinafter "Husband") and Wife were married on the 24th day of January, 1975, in Bloomington, Indiana, and lived there until June of 1976. The Petitioner has never resided in

the State of Indiana since that date. There were two children born of the marriage, plus a third child of Wife from an earlier marriage, who was adopted by Husband. After moving from the State of Indiana, the parties resided in the marital relationship in Keflavik, Iceland, and Bremerton, Washington.

On December 26, 1979, Wife returned to the residence of her parents, located in Vigo County, Indiana, along with the three children, and eventually initiated the above-referenced dissolution action. On January 12, 1980, Husband, a Lieutenant Commander in the United States Navy, was required to proceed to his new duty station in Rota, Spain. Prior to the filing of Wife's action, Husband moved the two natural children of the parties to Rota, Spain with him, after receiving repeated complaints from Wife that she was unable to properly care for them. Husband and the two children born of the marriage were neither domiciled nor were they residents of the State of Indiana at the time this action was filed.

Notice of the Indiana divorce proceeding was sent to Husband at his duty station in Spain. On April 11, 1980, Husband appeared specially by counsel and filed with the trial court his Motion to Dismiss. One of the grounds raised by this motion for dismissal was specifically the lack of personal jurisdiction over Husband (Record p. 23; App. p. 30). The issue of the trial court's lack of personal jurisdiction was further raised at the trial court level in Husband's Brief in Support of Motion to Dismiss (App. p. 32).

The trial court overruled Husband's Motion to Dismiss, that court finding that it had jurisdiction to render a child custody decree. The dissolution action was heard on final hearing, with a final decree being entered awarding custody of the parties' three children to Wife.

Husband timely filed his Motion to Correct Errors with the trial court. Among those issues being specifically reserved for decision at the appellate court level in the motion was that dealing with a lack of personal jurisdiction over the Husband (Record p. 76-77; App. p. 43).

On September 25, 1980, the trial court overruled Husband's Motion to Correct Errors and Husband's appeal to the Court of Appeals of Indiana was commenced. In that court, the following issue, *inter alia*, was raised on appeal (App. p. 2):

> . . . the trial court did not possess jurisdiction to award custody of the parties children under the Uniform Child Custody Jurisdiction Law and any such assertion of jurisdiction would violate his due process rights.

In its decision, the Court of Appeals first held that the trial court did lack *in personam* jurisdiction over Husband. In so holding, the Court of Appeals reversed that portion of the trial court's decree distributing the parties' marital property and ordering the payment of child support by Husband. Most importantly, the Court of Appeals, upon finding subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act ("UCCJA"), further held that *in personam* jurisdiction over Husband was not necessary in making a child custody determination. The Court of Appeals' holding is based on the conclusions that (1) minimum contacts between Husband and forum need not be shown in that custody is an adjudication of status and falls under the status exception of *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); and (2) the presence of *in personam* jurisdiction is not required under the UCCJA in any event.

Upon the denial of Husband's "Petition for Rehearing" by the Court of Appeals (App. p. 27), Husband submitted his Petition for Transfer to the Supreme Court of Indiana. Among those issues being reserved for decision by that court was that issue dealing with the lack of personal jurisdiction over Husband in the child custody determination (App. p. 48). The Supreme Court of Indiana denied Husband's petition by order dated August 10, 1982 (App. p. 26).

IX. Argument

The Indiana court—by ruling that personal or *in personam* jurisdiction over the adverse party in a child custody determination is not necessary—has effectively removed the fundamental protections of due process afforded Husband under the Fourteenth Amendment of the United States Constitution, as interpreted by this Court. The result of this decision is to allow an Indiana trial court to strip away the unarguably precious rights of a parent to custody of offspring, whereas the same court, under the same circumstances, would be without the power to render a judgment against the parent in a simple creditor-debtor lawsuit. This decision flies squarely in the face of a long line of due process decisions rendered by this Court, including *Kulko* v. *Superior Court of California*, 436 U.S. 84 (1978), *Shaffer* v. *Heitner*, 433 U.S. 186 (1977) and *May* v. *Anderson*, 345 U.S. 528 (1953).

Furthermore, the decision of the Indiana court emphasizes the confusion which is present among the various state courts on this issue. The question of personal jurisdiction in custody determinations has in the past created a virtual smorgasbord of holdings and rules relating to the necessity or degree of jurisdiction over a party required before a court may render a valid decree. The development of the Uniform Child Custody Jurisdiction Act (the Indiana version being found at Indiana Code 31-1-11.6 *et seq.*) and its promulgation by a large majority of the states, has not settled the question of personal jurisdiction in a child custody proceeding. As will be shown herein, there exists totally conflicting state court decisions

on this issue, many of these decisions having been only recently decided under the UCCJA.

This case presents to this Court a clearly defined factual situation in that the question of the existence of personal jurisdiction or minimal contacts of the Indiana court over Husband is not in dispute. The Court of Appeals of Indiana in its published opinion (App. p. 1) held that under no set of facts does there exist those certain "minimum contacts" between the state and party necessary for Indiana to exercise personal jurisdiction over Husband. The issue is thus not clouded by factual questions concerning the initial existence of personal jurisdiction. Surely the importance of the personal jurisdiction issue raised by this case as it pertains to the denial of Husband's due process rights, the conflict of the Indiana decision with earlier decisions of this Court, and the diversity of views and decisions in the various state courts stemming from a supposedly "uniform" act is worthy of this Court's scrutiny.

In holding that personal jurisdiction over Husband was not necessary for the trial court to render a child custody decree, the Court of Appeals of Indiana totally ignored the Fourteenth Amendment and the thrust of this Court's decision in *May* v. *Anderson*, 345 U.S. 528 (1953). In *May*, this Court was asked initially to determine if a Wisconsin custody decree, handed down without the trial court having acquired personal jurisdiction over the opposing parent, was binding on an Ohio court under the Full Faith and Credit Clause of the United States Constitution. This Court responded by holding that a custody decision rendered without obtaining jurisdiction over the person sought to be bound was not entitled to extraterritorial effect under the Full Faith and Credit Clause. Prior to

answering that question, however, Justice Burton, writing the plurality opinion in the case, first considered the nature of the adverse parent's rights at 345 U.S. 528, 533-534 (1953):

> . . . we have before us the elemental question whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody.
>
> • • •
>
> . . . In the instant case, we recognize that a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.

Clearly the *May* case stands for the proposition that custody decisions impinging on a parent's right to custody of his or her minor offspring are *in personam* in nature, and thus require that jurisdiction over the person must be obtained.

In *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), this Court held in regard to personal jurisdiction that:

> . . . due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, to have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

The extension of the *International Shoe* doctrine on due process and *in personam* jurisdiction came in this Court's decision in *Shaffer* v. *Heitner*, 433 U.S. 186 (1977). In

Shaffer, the Court first discussed the requirement of the Due Process Clause and the demise of the territorial jurisdiction theory of *Pennoyer* v. *Neff*, 95 U.S. 714 (1878). The court then went on to hold at 433 U.S. 186, 212 (1977) that:

> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny.

Husband implored both the trial court and the state appellate courts to follow the ruling precedent set down by *May*, *International Shoe* and *Shaffer*. The Indiana Court of Appeals and the Indiana Supreme Court have, however, refused to follow this Court's interpretation of the Due Process Clause and instead held that Wife need not demonstrate minimum contacts between Husband and the forum in custody proceedings under the UCCJA. This holding is in direct contravention with Justice Burton's opinion in *May*. The appellate court based this holding in part on its reasoning that the determination of child custody is a determination of status, much like a dissolution of marriage decree, by itself, is a determination of status. The Court of Appeals then further held that an Indiana trial court may adjudicate the question of custody under the UCCJA—and therefore totally cut off a parent's custodial rights to offspring—without the court having ever obtained personal jurisdiction over the parent given reasonable attempts to furnish notice of the proceedings. The authority relied upon by the Court of Appeals in reaching this conclusion is the so-called "status exception" of *Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

In a recent case, the Ohio Supreme Court has come to the opposite conclusion on the application of the "status exception" to child custody proceedings. In *Pasqualone*

v. *Pasqualone*, 63 Ohio St.2d 96, 406 N.E.2d 1121 (1980), an Ohio couple had entered into a written separation agreement which provided that the wife could take the couple's child to Indiana, but that she could not remove the child from the two-state area of Ohio and Indiana. The wife breached this agreement by moving the child, along with herself, to Illinois. Upon arriving in Illinois, the wife commenced an action for divorce and custody of the child. The husband obtained possession of the child during a visit and commenced his own divorce action in the Ohio courts. The Illinois court was the first to render a decree and awarded custody of the child to the wife. The Ohio Supreme Court refused to enforce the Illinois custody decree as the Illinois court clearly failed to have personal jurisdiction over the husband as required by *May* v. *Anderson*, 345 U.S. 528 (1953). In so holding, the Ohio court considered the argument that custody actions are status determinations not requiring personal jurisdiction over the non-petitioning parent. The court stated at 406 N.E. 2d 1121, 1126 (1980) that:

> It is argued that *Shaffer* v. *Heitner* leaves a narrow set of cases involving status which require no further contacts with a state than the presence of the party whose status is to be determined. This category, which was first mentioned in *Pennoyer* v. *Neff* (1878), 95 U.S. 714, 24 L.Ed 565, was discussed in *Shaffer*, where the court stated, in footnote 30, at page 208, in footnote 30, 97 S.Ct., at page 2582:
>
> > "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudication of status, are inconsistent with the standards of fairness."
>
> In *Shaffer*, though, the court did not exempt status determinations from the standards of fairness, but

> rather it stated that the presence of a party whose personal status is to be determined could constitute sufficient contact with a state for that state to fairly and justly make the determination.
>
> * * *
>
> In actuality *Shaffer* abandons traditional notions of status and of *in rem* jurisdiction in favor of considerations of fairness and substantial justice. The question becomes whether a person has sufficient contacts with a jurisdiction for that jurisdiction to fairly and justly make a determination against him on a particular matter. [Citation omitted].
>
> The Court in *May*, . . . by holding that custody decisions are *in personam* and by treating as irrelevant the technical domicile of the child, indicated that more contact than just the presence of a child's domicile in a state is required.

The totally opposite conclusions of the Indiana and Ohio decisions, coming as they do from adjacent jurisdictions, shows the confusion which exists in this area and the need for clarification by this Court.

This Court has only recently considered the effect of the *Shaffer* decision, as it applies directly to the area of family law, in *Kulko* v. *Superior Court of California*, 436 U.S. 84 (1978). The direct issue presented by the case was if due process required personal jurisdiction over an absent New York father to whom a child support obligation was to be imposed by a California court. This Court held that a forum state must have personal jurisdiction over an individual to enforce a child support judgment against him, even though the forum state is the domicile of the child and/or the custodial parent. The Court stated at 436 U.S. 84, 88 (1978) that the father's contacts with California were:

> . . . too tenuous under California's long-arm statute and the Constitution to establish the minimum nexus required under *Shaffer* and *International Shoe* for the imposition of financial obligations in a domestic relations case.

Clearly, the *Kulko* case can be seen to stand for the proposition that the due process requirements of minimal contacts and fundamental fairness, which must be present for personal jurisdiction to exist, are just as applicable to the domestic relations area as they are to the area of commercial transactions. It can be even further argued that *Kulko* requires in a family law case an even greater degree of contact between the party to be bound and the forum. This is an interpretation of *Kulko* which is shared by even those critical to the requirement of *in personam* jurisdiction in a child custody case. See, Bodenheimer and Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko* (1979) 12 U.C. Davis L.Rev. 229, 231, 237-239.

By viewing both *Kulko* and *May* together, it can only logically be concluded that the requirement of personal jurisdiction over an adverse parent—as that jurisdiction is defined in the sense of *International Shoe* and *Shaffer*—must extend to include custody determinations. In *May*, the right of custody was analogized as being a personal right similar to alimony and that as such, it was entitled to as much protection as the right of alimony. This analogy, which would most certainly apply to child support payments as well, is just as valid today under the "minimum contacts" concept of jurisdiction. In short, the Indiane appellate court decision has decided this exceedingly important constitutional due process question in such a way that it directly conflicts with the above-stated decisions of this Court.

In reaching its decision that personal jurisdiction over a parent is not required in a custody proceeding, the Indiana appellate court, in addition to concluding that the *Shaffer* status exception was applicable, also holds that in any event, personal jurisdiction is not required over the adverse parent in a custody determination made under the UCCJA. The appellate court states in its opinion that (App. p. 22-23):

> The paramount issue in custody proceedings is the best interests of the child, not the feuding parents. The Uniform Act therefore focuses primarily on the state where the child and family, not a parent alone, maintain significant connections. (Footnote omitted).
>
> • • •
>
> The Uniform Act's jurisdictional provisions therefore comport with mandates of *Shaffer*. Where the petitioner has complied with the notice provisions, [footnote omitted] the assumption of jurisdiction by a forum meeting the jurisdictional provisions of the Uniform Act satisfies the "traditional notions of fair play and substantial justice" *Shaffer*, . . . embodied in the due process clause.

The UCCJA's jurisdictional provisions are found at Section 3 of the Act (Indiana version being Indiana Code 31-1-11.6-3). It is the intent of this section to provide that initial custody jurisdiction be primarily in the home state of the child; or, if this requirement cannot be met, then in the state that has the significant connection with the child and family. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 Family L.Q. 203, 204.

Under the Indiana appellate court's interpretation of Section 3 of the UCCJA, once the Indiana trial court has met the jurisdictional provision of the Act, it need not

obtain personal jurisdiction over the parent sought to be bound by the decree. Substantial conflict exists on this issue among the various state courts that have considered it. In opposition to the Indiana position is *Pasqualone* v. *Pasqualone*, 63 Ohio St.2d 96, 406 N.E.2d 1121, 1127, wherein the Ohio Supreme Court stated that:

> In a custody case, . . . as in a child support or alimony case, it is not fair and reasonable to allow one party to bind the other party on the basis of his unilateral acts. A court must balance the conflicting interests. Although the contacts required to allow a court to make a binding custody order may not need to be as great as those required to order a payment, more contact is required than would be required in a divorce action. In this sense, *May*, in requiring jurisdiction over the person, survives today as good law.

Also in opposition to the Indiana holding is the decision of the Supreme Court of Montana in *State ex rel Muirhead* v. *District Court of First Judicial District*, 196 Mont. 535, 550 P.2d 1304 (1979). The facts of that case involved a father who had removed his children from the State of Washington after a Washington court had awarded custody of the children to the mother. The father then obtained an order in Montana awarding him custody of the children. On review, the Montana court held that absent *in personam* jurisdiction over the mother in Washington, any attempt by Montana to exercise custody jurisdiction would be in violation of wife's due process rights at law.

Other state courts have ruled similarly to the Indiana appellate court by holding that personal jurisdiction over the adverse parent is not required. Two decisions holding this are *Goldfarb* v. *Goldfarb*, 246 Ga. 24, 268 S.E.2d 648 (1980) and *In re Marriage of Leonard*, 122 Cal.App.3d 443, 175 Cal.Rptr. 903 (1981).

The UCCJA has now been adopted by almost all of the states of this union. In order for it to function as intended on a national scale, it must be interpreted uniformly. Furthermore, in order for the Act to function effectively, it must be interpreted in conjunction with this Court's decisions on due process and *in personam* jurisdiction. Without *in personam* jurisdiction, the goal of the Act towards making custody determinations based on the "best interests" of the children means nothing, since a court acting without it would be powerless to provide for the future support of the child, or to even enforce its own decrees. This case presents to this Court a situation where the decisions of the various states are clearly in confusion. The narrow and clearly defined constitutional issue in question and the seriousness of the rights being dealt with most certainly merit this Court's attention and consideration.

For all the reasons set forth above, it is respectfully submitted that Husband's petition for certiorari should be granted.

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APPENDIX

Opinion of the Supreme Court of Indiana, Fourth District

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IN THE

COURT OF APPEALS OF INDIANA

FOURTH DISTRICT

IN RE: THE MARRIAGE OF	)	
	)	
	)	
SUSAN HUDSON	)	
	)	
(Petitioner Below)	)	No. 1-1080 A 310
	)	
and	)	
	)	
RONALD R. HUDSON	)	
	)	
(Respondent Below)	)	

APPEAL FROM THE VIGO SUPERIOR COURT
DIVISION 2
THE HONORABLE CHARLES K. McCRORY, JUDGE
Cause No. SC-80-377

MILLER, P.J.

Respondent-husband Ronald R. Hudson appeals from a trial court's judgment in a dissolution proceeding which

1) dissolved the parties' marriage 2) distributed the marital property and 3) awarded custody of their three children to Petitioner-wife Susan C. Hudson. Specifically Ronald contends the trial court lacked jurisdiction over all three matters claiming 1) Susan did not satisfy the six month's residency requirement for obtaining a dissolution decree; 2) Susan did not maintain continuous residency in Indiana and therefore the trial court lacked jurisdiction to distribute the marital property; and 3) the trial court did not possess jurisdiction to award custody of the parties' children under the Uniform Child Custody Jurisdiction Law and any such assertion of jurisdiction would violate his due process rights. We hold the trial court was vested with jurisdiction to dissolve the marriage but lacked jurisdiction to distribute the bulk of the marital assets. We additionally find that, at the time Susan's petition for dissolution was filed, the trial court was vested with jurisdiction to determine custody of the parties' children, given Susan's and the children's significant connections with Indiana. We therefore affirm in part, reverse in part and remand for further proceedings.

FACTS

We initially note that a transcript of the hearing on Susan's petition was not certified for our consideration on appeal. Our review of the facts is therefore limited to the pleadings and the transcript of a hearing on Ronald's motion to dismiss for lack of subject-matter and *in personam* jurisdiction.

The facts most favorable to the trial court's judgment are the following. Susan was a life-long resident of Indiana at the time of her marriage to Ronald in January of 1975. The parties were married in Bloomington, Indiana and initially resided there for approximately one and a

half years. At the time of their marriage, Susan had custody of Christine, her natural child from a former marriage, whom Ronald legally adopted. Ronald was enlisted in the United States Navy and was transferred to Iceland in mid-1976 where the parties and Christine resided for approximately two and a half years. While living in Iceland, the parties had two children, Thomas and Monique.

In 1978 Ronald was transferred to the State of Washington for a one year program at the University. While Ronald attended school, the parties and their three children resided in Bremerton, Washington for nine months until July of 1979. At that time, Susan returned to her parents home in Indiana and lived there for approximately one and a half months. According to her testimony she returned to Washington in August of 1979 in order to encourage Ronald to seek marriage counseling, to gather some additional personal possessions and to arrange for Ronald to set up a home, separate from her parents, for her and the children in Indiana until their marital difficulties could be worked out. After four months in Washington, Susan returned to Indiana in December of 1979 with the children where she has since resided.

Ronald continuously claimed Oregon as his voting and legal residence. The parties, however, never lived together in Oregon except for a brief period during which they stayed with his parents while they set up housekeeping in Washington. In January of 1980, Ronald was transferred to a military installation in Rota, Spain. Susan and the children continued to reside in Indiana. On March 12, 1980, Ronald apparently forcibly removed Monique and Thomas from Susan's custody and took them back to Spain where they still resided at the time of the trial court's judgment.

On the same day Ronald seized the two children, which was approximately eight months after Susan's initial return to Indiana, Susan filed a petition for dissolution and child custody in the Vigo Superior Court in Indiana. Ronald was served notice of the proceedings by mail on March 24, 1980. On April 11, 1980 counsel for Ronald appeared and filed a motion to dismiss for lack of subject-matter and *in personam* jurisdiction. After a hearing and after the submission of briefs and memoranda, the trial court denied the latter motion and set the petition for hearing. On July 15, 1980 the trial court entered a decree of dissolution, distributed all the marital property and awarded Susan custody of the three children. Thereafter Susan petitioned for issuance of a rule to show cause stemming from Ronald's alleged failure to relinquish custody of Monique and Thomas and to pay support as had been ordered by the trial court. Ronald moved for a stay of proceedings to enforce the trial court's judgment, under Ind. Rules of Procedure, Trial Rule 62(B)(1), pending a ruling on his motion to correct errors and any further appellate proceedings. Both the trial court and this Court overruled his request for a stay.

Ronald appeals from the trial court's rulings raising the following issues for review:

1) Did the trial court possess jurisdiction to dissolve the parties' marriage?

2) Did the trial court possess jurisdiction to distribute the parties' property?

3) Did the trial court possess jurisdiction under the Uniform Child Custody Jurisdiction Act to award custody of the parties' three children?

4) Did the trial court err in refusing to consider Ronald's motion for a stay of proceedings to enforce its custody and support orders?

DECISION

Dissolution

Ronald contends the facts do not support the trial court's determination that Susan was a resident of Indiana for six months preceding the filing of her petition for dissolution.[1] In this regard, Ronald first argues that upon their marriage Susan acquired Ronald's domicile since she did not maintain physical presence in Indiana and evidenced no intent to establish Indiana as her separate domicile. He therefore argues Susan's requisite physical presence and intent to establish a separate domicile in Indiana did not occur until December of 1979 since she had not *continuously* resided in Indiana after her initial return to her parents' home in July of that year. We cannot agree with Ronald's latter conclusion.

We acknowledge the general rule in Indiana presumes the wife's residence "follows" that of the husband. *In re Marriage of Rinderknecht,* (1977) Ind.App., 367 N.E.2d 1128, 1132; *accord Curtis* v. *Curtis,* (1891) 131 Ind. 489, 30 N.E. 18. However, it is also recognized that strict adherence to the rule is inconsistent with the Married Women's Property Acts according women full legal capacity; it is unseemly reminiscent of the long discredited

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[1] IND. CODE 31-1-11.5-6 provides:

"Residence and Venue. (a) At the time of the filing of a petition pursuant to section 3(a) of this chapter, at least one (1) of the parties shall have been a resident of the state or stationed at a United States military installation within the state for six (6) months immediately preceding the filing of each petition."

fictional identity of husband and wife.[2] I MOORE'S FEDERAL PRACTICE ¶0.74[6.-1] (2d ed. 1981) and cases cited therein. The majority of jurisdictions, including Indiana, have therefore concluded a married woman may establish a residence or domicile separate from her husband for whatever reason, and the usual test for determining a party's residence may apply. *In re Marriage of Rinderknecht, supra.*

Applying this test in the case at bar, we find the evidence was sufficient to support the trial court's determination that Susan was an Indiana resident at the time she filed her petition for dissolution. As explained in *Rinderknecht:*

> "'It is the general rule in construing a statute which prescribes residence as a qualification for the enjoyment of a privilege, or the exercise of a franchise, that domicile and residence are deemed to be equivalent or synonymous, i.e., that the word residence is deemed to mean domicile. . . .
>
> The term domicile in a strict legal sense has been defined as the place where a person has his true, fixed, permanent home and principal establishment, *and to which place he has, whenever he is absent, the intention of returning.* Ballentine Law Dictionary, p. 400. *To acquire a domicile of choice, there must be an actual residence in a particular place together with an intention to remain there.* A place cannot serve as a domicile merely by force of bodily presence there when it is unaccompanied by an intention to live there

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[2] In *Brokus* v. *Brokus,* (1981) Ind.App., 420 N.E.2d 1242, 1245 this Court implied that the spouse of a person enlisted in the military who travels from state to state under military orders might be found to have maintained residence in the state of his or her last separate domicile. The *Brokus* Court, constrained by the trial court's findings of fact, was unable to reach this issue.

permanently, or at least indefinitely. 11 I.L.E., 'Domicile,' §2, p. 3. As distinguished from domicile, residence may be any place of abode or dwelling regardless of how temporary. . . .' " (Emphasis added.)

Id. at 1131-32, *quoting Board of Medical Registration & Examination* v. *Turner,* (1960) 241 Ind. 73, 79-80, 168 N.E.2d 193, 196-97. Although Susan concedes in her brief that after initially living in Indiana for a year and a half she "did not continuously reside in Indiana after the parties were transferred to Iceland," she does point out that the evidence demonstrates she moved to her parents' home in Indiana in July of 1979, approximately eight months before she filed a petition for dissolution. She brought some personal possessions to Indiana at that time and left in August for the sole purpose of arranging her affairs in Washington and with the intention of returning to Indiana for an indefinite period of time. Further, upon her return to Indiana she registered (at an unspecified time) to vote in Indiana. With due regard to the trial court's ability to determine the credibility of witnesses, *In re Marriage of Julien,* (1979) Ind.App., 397 N.E.2d 651, we believe the evidence supported the court's exercise of jurisdiction over the marital status of the parties.

Property Distribution

The trial court's decree of dissolution also distributed the parties' marital property, both real and personal, pursuant to Susan's petition. Except for a few of Susan's personal belongings, the bulk of the parties' personalty, which included an automobile and household furnishings, was located in Spain at the time of the hearing. The parties also retained an interest in two parcels of realty located in Washington and Oregon. As previously noted, Susan only recently resumed Indiana residency and Ron-

ald was an Oregon resident stationed in Spain. Under these facts we find the trial court lacked jurisdiction to distribute the marital property.

A party's residence in this state constitutes sufficient contact to provide a trial court with jurisdiction over the parties' marital status, but it is not sufficient to confer jurisdiction to distribute the parties' marital assets if the other party is a nonresident. *In re Marriage of Rinderknecht, supra.* An analogous situation was presented in *Rinderknecht,* where the husband, a member of the armed forces, continuously maintained Indiana residency. However, the parties never lived in the marital relationship in Indiana and the wife was a Nebraska resident. The Indiana trial court therefore lacked jurisdiction to distribute the marital property since *in personam* jurisdiction over both parties is traditionally required when adjudicating the incidences of marriage. *Id.* at 1133 *citing Estin* v. *Estin,* (1948) 334 U.S. 541. A court obtains such jurisdiction if there are certain "minimum contacts" between the state and the party over whom the state seeks to exercise control. *In re Marriage of Rinderknecht, supra citing International Shoe Co.* v. *Washington,* (1945) 326 U.S. 310. Generally, for purposes of distributing the marital property, this minimum contact requirement may be met under Ind. Rules of Procedure, Trial Rule 4.4(A) (7), *Id.,* which provides as follows:

> "(A) Acts serving as a basis for jurisdiction. Any person or organization that is a nonresident of this state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:
>
> . . .
>
> (7) *living in the marital relationship within the state notwithstanding subsequent departure from the*

> *state,* as to all obligations for alimony, custody, child support, or property settlement, *if the other party to the marital relationship continues to reside in the state.*" (Emphasis added.)

Susan relies principally on this provision by alleging the parties lived in Indiana for one and a half years at the beginning of their marriage. But as noted earlier she also concedes in her brief that she "did not reside continuously in Indiana after the parties were transferred to Iceland." We must note the above rule conditions jurisdiction over the nonresident under this subsection to instances where the other party *continues* to reside in Indiana.

In construing this provision we must give effect to the plain meaning of the language used. *E.g.,* IND. CODE 1-1-4-1. From this view of the rule, it is apparent that the party must maintain *continuous* residency in Indiana. This view of the rule is supported by judicial constructions of the virtually identical rule in Kansas which served as the pattern for T.R. 4.4(A)(7). Civil Code Study Commission Comments, 1 W. HARVEY, INDIANA PRACTICE at 298 (1969); *Id.* at §4.4(D) at 71 (Supp. 1980). It is presumed that when language or statutes are adopted from a sister state, the constructions placed upon such language or statutes are adopted as well. *Matter of City Investing Co.,* (1980) Ind.App., 411 N.E.2d 420. Before its adoption in Indiana, Kansas rule K.S.A. 60-308(b)(8) had been construed as requiring continuous residency which precluded a spouse's change of residence between the time the parties lived in the marital relationship and the resumption of residency before the petition for dissolution was filed. *E.g., Scott* v. *Hall,* (1969) 203 Kan. 331, 454 P.2d 449. We therefore cannot accept Susan's contention that her *return* to Indi-

ana in July of 1979 satisfied the requirements of T.R. 4.4(A)(7).[3]

Susan proposes two alternative theories to support the trial court's exercise of jurisdiction over the parties' marital property. She first argues a party may voluntarily submit to a court's personal jurisdiction by either failing to make a timely objection or by seeking affirmative relief. *Killearn Properties, Inc.* v. *Lambright*, (1978) Ind.App., 377 N.E.2d 417. The record, however, discloses Ronald first filed a motion to dismiss under Ind. Rules of Procedure, Trial Rule 12(B)(1) and (2) in response to Susan's petition, entering a "special appearance" solely for the purposes of contesting the court's jurisdiction, both *in personam* and over the subject-matter. As explained in *In re Marriage of Rinderknecht, supra* at 1136, fn. 11:

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[3] We note that *Rinderknecht* involved only the distribution of personal property. It did not address the possibility of distributing real property located in Indiana under the provisions of T.R. 4.4 (A)(5) regarding jurisdiction in actions concerning possession or interest in real property within this state. It appears a trial court could distribute such property pursuant to its *in rem* jurisdiction. As explained in *Shaffer* v. *Heitner*, (1977) 433 U.S. 186, which extended the minimum contacts standard of *International Shoe, supra*, to *in rem* actions:

> "[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest."

Id. at 207-08. In the instant case, however, the parties' marital property did not include real estate in Indiana.

> "If the defendant has made a timely challenge of the court's *in personam* jurisdiction in his answer or by filing a TR 12(B)(2) motion, he does not, by addressing the merits of the case, waive any issue as to personal jurisdiction, and such issue may properly be raised on appeal, together with any other issues which have been properly preserved."

We must therefore conclude Ronald did not waive the issue of the trial court's *in personam* jurisdiction.

Susan also asserts Ronald is estopped from challenging the trial court's *in personam* jurisdiction due to his alleged testimony advising the trial court that, (according to Susan's brief) "he would abide by the trial court's decision concerning the matter of child custody."[4] Susan characterizes this statement as a request for affirmative relief from the trial court. We cannot agree. These circumstances are vitally different from those in *Kelley* v. *Kelley*, (1979) Ind.App., 387 N.E.2d 452, on which Susan relies, where the nonresident defendant submitted an agreed entry on child custody for the court's approval. The defendant's submission in *Kelley* effectively requested the trial court to affirmatively exercise jurisdiction in the cause. Under such circumstances the defendant was estopped from denying the trial court was possessed with *in personam* jurisdiction in the first place. In contrast Ronald's ambiguous testimony in the instant case appears to be simply a recognition of the court's integrity by promising to abide by its *lawful* orders. We find nothing in the statement affirmatively requesting the trial court to exercise its jurisdiction. Surely such a statement neither waived nor erected an estoppel against Ronald's defenses to the trial court's actions at trial or on appeal.

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[4] That portion of the record allegedly containing Ronald's testimony has not been brought before us on appeal.

We must conclude the trial court lacked *in personam* jurisdiction over Ronald. Consequently that portion of the decree which distributed the marital property must be reversed.[5]

Child Custody

Ronald also contends the trial court lacked jurisdiction to award custody of the parties three minor children. He first argues Indiana did not acquire jurisdiction under the provisions of the Uniform Child Custody Jurisdiction Law (UCCJL). Alternatively, Ronald contends the trial court's exercise of jurisdiction under the UCCJL violated his due process rights. We disagree with both contentions.

A child custody proceeding may be commenced pursuant to the filing of a petition for dissolution. IND. CODE 31-1-11.5-20; *Brokus* v. *Brokus,* (1981) Ind.App., 420 N.E. 2d 1242. Jurisdiction of a child custody proceeding instituted in this manner is determined by reference to the UCCJL, IND. CODE 31-1-11.66 *et seq.* IC 31-1-11.5-20.[6] Specifically, the UCCJL provides in pertinent part:

> "Jurisdiction. (a) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

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[5] Although neither party raises the question, we note that pursuant to *Rinderknecht,* the trial court was nevertheless possessed with jurisdiction to distribute property in which Susan had the sole interest. Whether such rule is applicable in the case at bar is for the trial court's determination.

[6] The UCCJL is Indiana's version of the Uniform Child Custody Jurisdiction Act (hereinafter referred to as the Uniform Act) reported at 9 Uniform Laws Annotated 107 (1972 Master ed.)

(1) this state (A) is the home state of the child at the time of commencement of the proceeding, or

(B) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or

(2) it is in the best interest of the child that a court of this state assume jurisdiction because (A) the child and his parents or the child and at least one (1) contestant, have a significant connection with this state, and (B) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this state and (A) the child has been abandoned or (B) its is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

(4)(A) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2) or (3), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (B) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this state of the child, or of the child and one (1) of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(c) Physical presence of the child, while desirable, is not prerequisite for jurisdiction to determine his custody."

IC 31-1-11.6-3. Ronald first contends none of the above provisions apply in the case at bar and therefore the trial court lacked subject-matter jurisdiction or, more specifically, jurisdiction over this particular controversy. Ronald alternatively contends jurisdiction rests in either Washington or Oregon who are also signatories to the Uniform Act.

Ronald's challenge necessitates a close examination of the UCCJL's jurisdictional provisions. The first and second provisions of the jurisdictional section, quoted above, provide the two major bases for jurisdiction: the "home state" test and the "significant connections" test. Commissioners' Note, 9 Uniform Laws Annotated at 123.[7] These two tests provide alternative bases for jurisdiction.

Id.

"Home state" is defined in IC 31-1-11.6-2(5) as follows:

> "'[H]ome state' means the state in which the child, immediately preceding the time involved, lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive months, and in the case of a child less than six (6) months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six (6) month or other period."

Neither party claims Indiana was the children's home state, within the statutory definition, at the time Susan's petition was filed on March 12, 1980. Apparently Susan did not bring all three children to Indiana when she ini-

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[7] IC 31-1-11.6-3, quoted above, is identical to paragraph three of the Uniform Act. We therefore find the Commissioners' notes particularly helpful.

tially separated from her husband in July of 1979. Although all three children resided with Susan in Indiana from December of 1979 until Ronald unilaterally removed the two youngest children to Spain on March 12, 1980 it appears the children had not resided in Indiana for the requisite six month period.

Ronald argues either Oregon or Washington would satisfy the home state test at the time the proceedings were begun. We cannot agree. None of the children resided in Oregon except for a brief period while the parties looked for a house in Bremerton, Washington. Furthermore, at the time the proceedings were commenced none of the children had resided in Washington for the past three months. Although *temporary* absences may be included under the home state test, IC 31-1-11.6-2(5), neither party evidenced any intention to return to Washington. Ronald was stationed in Spain and had maintained residency in Oregon, not Washington, and Susan had established residency in Indiana. These latter facts also defeat home state jurisdiction in these foreign states under IC 31-1-11.6-3(a)(1)(B). Under that provision a state which would satisfy the home state test except for the children's absence retains jurisdiction for an additional six months *if a parent continues to reside in that state.* Neither Susan nor Ronald, however, continued to live in Washington. We must conclude there is no state which qualified as the children's home state at the time the proceedings were commenced in Indiana.

We must therefore turn to the "significant connection" provision of IC 31-1-11.6-3(a)(2). This alternative basis for jurisdiction was specifically drafted to come into play *when the child has been recently removed from his or her home state and the remaining spouse has also moved away.*

Commissioners' Note, 9 Uniform Laws Annotated at 123.[8] Under this test, the state with jurisdiction is the one which has the maximum access to relevant evidence regarding the child's "present or future care, protection, training, and personal relationships." IC 31-1-11.6-3(a)(2)(B).

In this regard, Ronald appears to propose a strictly quantitative approach, contending Washington is the more appropriate forum since the children and their parents lived there for approximately nine months before the parties left that state in late 1979. At the time of the proceedings, the parties' children, Christine Susan, Thomas Clifford and Monique Ann were approximately 8, 3 and 1½ years old respectively. Although the two youngest children had therefore spent a relatively significant portion of their lives in Washington, we do not believe this fact alone is dispositive.

The significant connection test requires more than a strictly quantitative analysis. The UCCJL was designed to place the issue of custody in the forum most appropriate to determine the best interests of the children. Brigitte M. Bodenheimer, "The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws," 22 Vand. L. Rev. 1207, (1969) (hereinafter referred to as "Bodenheimer"). As explained by the reporter for the Uniform Act who is recognized as a leading authority on its provisions: "the most significant evidence will have to come from the parents themselves, from other persons who might be entrusted with the care of the child, and from those who can testify about the competence of these persons as custodians." *Id.*

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[8] As pointed out by the Commissioners, the operation of the significant connection test under such circumstances is also emphasized by the last clause of the home state provision, which provides for jurisdiction under the home state theory only where a parent continues to reside in the home state. IC 31-1-11.6-3(a)(1)(B).

at 1223. The Act is expressly concerned not only with the past care of the children, but with their *present* and *future* care. IC 31-1-11.6-3(a)(2)(B). To this extent, the forum should have access to information concerning the affect on the children of materially changed circumstances.

In the instant case, we find it particularly significant that both parties permanently left Washington. At the time of the hearing, neither the parents nor their children had any connection with Washington for at least over four months. The children were not merely physically present in Indiana. Susan was not a temporary visitor to this state, but established residency here with her parents. More significantly, the parties lived in Indiana as a family in the not too distant past for a year and a half, and Christine, the eldest child, lived in Indiana for all but three years of her life. All three children were currently living in Indiana with their mother at their grandparents' home until Ronald's unilateral removal of the two youngest children. Christine attended school here and Thomas attended pre-school in Indiana. Indiana therefore had ready access to substantial relevant evidence concerning not only the past conduct of the parties but the present and future circumstances of both Susan and the three children. In contrast, the only evidence concerning Ronald's present and future care of the children existed not in Washington but in Spain, where he had lived with only two of the children for one month at the time of the hearing. We must therefore conclude the children and at least Susan had a significant connection with Indiana and there was substantial evidence concerning the children's present and future care, protection, training and personal relationships available in this state.

This is not to say that jurisdiction could not have been properly assumed also in Washington. The facts in this

case present a close question.[9] Arguably, the parties' temporary stay in Washington could have satisfied the significant connection test under the Uniform Act. However, custody proceedings were never instituted in Washington and we are not confronted with the problem of competing jurisdiction. Indiana has assumed jurisdiction substantially in conformance with the Uniform Act's provisions and its decree will doubtlessly be accorded binding force in Washington and other states under section 12 of the Uniform Act, if the occasion arises.[10] As suggested in

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[9] Bodenheimer concedes the resolution under a similar set of circumstances would be uncertain:

> "Consider another illustration: suppose the matrimonial home is in state A, and the husband remains there. The wife and children with the consent of the husband move to state B, which is the wife's former home state and where her parents live. They have been in state B for three months when court proceedings are prepared. Relevant facts about the children's present condition and care are in state B along with some of the facts about the qualifications of one of the potential custodians. State A has the information concerning the past relationship between each parent and the children as well as most of the facts about the other potential custodian. Here again, it will be difficult to decide which state has more of the relevant evidence."

Bodenheimer, supra at 1222-23. Of course, in the instant case, Ronald did *not* remain in Washington, the last matrimonial home.

[10] Section 12 provides:

> "Binding Force and Res Judicata Effect of Custody Decree. A custody decree rendered by a court of this state which had jurisdiction under section 3 of this chapter binds all parties who have been served in this state or notified in accordance with section 5 of this chapter or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this chapter."

The UCCJL contains an identical provision at IC 31-1-11.6-12.

Bodenheimer, supra at 1217: "it is less essential to determine with precision *which state* has jurisdiction than to insure that the courts involved cooperate fully in fact-gathering. . . ." (Emphasis in original). The UCCJL provides ample mechanisms for conveying whatever evidence may be available in Washington concerning the family's temporary stay in that state to the Indiana forum. Specifically, IC 31-1-11.6-18 and 19 provide for taking testimony and requesting hearings and studies in other states when such evidence will shed light on the best interests of the child.[11] We therefore find that under the close circumstances of this case, the trial court did not abuse its discretion in assuming jurisdiction over the custody proceedings.[12]

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[11] The Indiana provisions are similar to §§18 and 19 of the Uniform Act.

[12] Ronald contends the trial court erred in failing to "make specific findings on the jurisdictional basis for jurisdiction" under the UCCJL, citing *Clark* v. *Clark*, (1980) Ind.App., 404 N.E.2d 23 for support. Ronald's argument is unclear. No specific findings of fact within the meaning of Ind. Rules of Procedure, Trial Rule 52(A) were requested or required. However, *Clark* does require a *determination* of subject-matter jurisdiction under the UCCJL where a custody dispute has interstate dimensions. *Id.* at 30. The court's order book should affirmatively reflect the court's consideration of the UCCJL by incorporating its conclusion on this issue, although the failure to do so does not automatically result in reversible error. *Id.*

In the instant case, the transcript and record of the proceedings amply demonstrate the trial court's consideration of the UCCJL. The issue was fully briefed and argued before the trial court by both parties. Although the order book does not specifically reflect the court's conclusions in this matter, Ronald's motion to dismiss based on lack of jurisdiction was overruled, a hearing was held regarding custody, and the trial court properly assumed jurisdiction under the UCCJL. The failure to include an order book entry to this effect was not reversible error.

Ronald additionally contends the trial court's exercise of jurisdiction over the custody proceedings violated his due process rights since the court lacked *in personam* jurisdiction. We find a petitioner need not demonstrate minimum contacts under *International Shoe* between the absent parent and the forum in custody proceedings under the UCCJL. Rather, custody is in effect an adjudication of a child's status, which falls under the status exception of *Shaffer* v. *Heitner*, (1977) 433 U.S. 186. A court may therefore adjudicate custody under the UCCJL without acquiring personal jurisdiction over an absent party given reasonable attempts to furnish notice of the proceedings.

In this regard Ronald's partial reliance on *Rinderknecht* is not persuasive. That case recognized both the *in rem* and *in personam* nature of claims traditionally raised in dissolution proceedings. It concluded that although under *Shaffer* the minimum contacts standard of *International Shoe* applied to both types of actions, "two levels of minimum contact may be found sufficient to meet the requirements of 'Fair play and substantial justice' which are inherent the minimum contacts test." *In re Marriage of Rinderknecht, supra* at 1134. A determination changing the marital status of the parties, consistently viewed as a proceeding *in rem* is supported by minimum contacts where one of the parties is a resident, although the court is unable to obtain *in personam* jurisdiction over the nonresident spouse. On the other hand, mere residency of one spouse is insufficient to meet the minimum contact requirement for exercising *in personam* jurisdiction in adjudicating the "incidences of marriage." *Id.* at 1135. Ronald appears to contend that the issue of child custody falls in the latter category. However, *Rinderknecht* was only concerned with dissolution and property distribution and did not involve a jurisdictional challenge to the cus-

tody award. We must therefore return to an examination of *Shaffer* and other authorities to determine the jurisdictional requirements in custody proceedings.

The first significant case dealing with the issue of state court jurisdiction in custody cases was Justice Traynor's opinion in *Sampsell* v. *Superior Court,* (1948) 32 Cal.2d 763, 197 P.2d 739. *Sampsell* adopted three alternative bases for jurisdiction—the child's domicile, the child's physical presence or personal jurisdiction over both contestants. This multiple jurisdiction test was widely accepted and incorporated into the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §79 (1971). Its adoption, however, resulted in conflicting decrees among competing jurisdictions and a rampant "seize-and-run" approach to custody cases (where a parent, perhaps repeatedly, abducts a child and flees beyond a state's borders to avoid jurisdiction).

The problem was further complicated by the United States Supreme Court's decision in *May* v. *Anderson,* (1953) 345 U.S. 528. In its plurality opinion, the Court held Ohio was not *required* to accord full faith and credit to a custody decision rendered in Wisconsin because the latter forum failed to acquire personal jurisdiction over the mother, an Ohio resident. The plurality's opinion in *May* has been severely criticized. For example, several distinguished commentators have complained that an interpretation of *May* requiring personal jurisdiction in custody proceedings "would be a catastrophe." Brigitte M. Bodenheimer & Janet Neeley-Kvarme, "Jurisdiction and Child Custody and Adoption after Shaffer and Kulko," 12 U. Cal. D.L. Rev. 229, 243 (1979), (hereinafter cited as Bodenheimer & Neeley-Kvarme) *quoting,* H. CLARK, THE LAW OF DOMESTIC RELATIONS 610 (1968). Consequently, the plurality opinion in *May* has enjoyed

little acceptance. Rather *May* has been interpreted in accord with Justice Frankfurter's concurring opinion which posits the plurality view as *permitting* states to recognize foreign custody decrees rendered without personal jurisdiction over an absent parent under local law but not *requiring* them to do so under the full faith and credit clause. *Id.* at 535-36 (Frankfurter, J. concurring); *Bodenheimer, supra* at 1232.

The Uniform Act was based on this interpretation of *May*. *Bodenheimer, supra* at 1232. *In personam* jurisdiction is not required under the Uniform Act. *E.g., Bodenheimer, supra* at 1231-35; Bodenheimer & Neeley-Kvarme, *supra;* Brigitte M. Bodenheimer, "Interstate Custody: Initial Jurisdiction & Continuing Jurisdiction under the UCCJA," 14 Family L.Q. 203 (1981); Note, "Jurisdiction-Uniform Child Custody Jurisdiction Act," 51 Temple L.Q. 139, 148 (1978). Rather, the Uniform Act adopts the traditional *in rem* approach to custody cases, recognizing the character of such proceedings "is entirely different from child support proceedings and other actions involving monetary or property claims," Bodenheimer & Neeley-Kvarme, *supra* at 233, which are more appropriately characterized as *in personam* actions. *See e.g., Kulko* v. *Superior Court,* (1978) 436 U.S. 84 (personal jurisdiction required over absent parent in *support* proceedings). The paramount issue in custody proceedings is the best interests of the *child,* not the feuding parents. The Uniform Act therefore focuses primarily on the state where the child and family, not a parent alone, maintain significant connections.[13]

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[13] The Uniform Act and the UCCJL have secured enforcement of custody decrees by sister states, thus avoiding the full faith and credit problem, by incorporating §12 according foreign decrees binding force. See §12 quoted in footnote 10, *supra.*

The Supreme Court's opinion in *Shaffer* recognized the necessity of such specialized jurisdictional rules in *in rem* status proceedings. After concluding the minimum contact standard of *International Shoe* applied to *in personam* and *in rem* actions alike, the Court cautioned: "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness." *Shaffer* v. *Heitner, supra* at 208, n.30.[14]

The Uniform Act's jurisdictional provisions therefore comport with the mandates of *Shaffer*. Where the petitioner has complied with the notice provisions,[15] the assumption of jurisdiction by a forum meeting the jurisdictional provisions of the Uniform Act satisfies the "traditional notions of fair play and substantial justice" *Shaffer, supra, passim*, embodied in the due process clause. *Rinderknecht* adopted this *in rem* status approach to dissolution proceedings, and we hold the same theory supports a court's assertion of jurisdiction in custody proceedings. Bodenheimer & Neeley-Kvarme, *supra*; "Developments in the Law: The Constitution and the Family," 93 Harv. L. Rev. 1156, 1246-48 (1980); *cf.*, *Goldfarb* v. *Goldfarb*, (1980) Ga., 268 S.E.2d 648 (parent's continuous residency in forum state provides sufficient nexus to satisfy

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[14] Furthermore, the Supreme Court has apparently recognized the unique nature of similar proceedings and the concommitant necessity for specialized jurisdictional rules in *Stanley* v. *Illinois*, (1972) 405 U.S. 645 where notice by publication was held sufficient to terminate the rights of an unwed father when personal service could not be obtained. In fact, at least one commentator has suggested *Stanley* v. *Illinois* overruled *May "sub silentio."* H. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 673 (2d ed. 1974).

[15] Uniform Act, §§ 4, 5 and IC 31-1-11.6-4 and 5. In his brief, Ronald does not challenge service of process.

due process); *In re Appeal in Maricopa County*, (1976) 25 Ariz.App. 333, 543 P.2d 454 (personal jurisdiction over absent parent not required in proceedings for the termination of parental rights). We conclude the trial court's assertion of jurisdiction over the custody proceeding without obtaining *in personam* jurisdiction over Ronald did not violate his due process rights.

Request for a Stay

Ronald finally contends the trial court erred in "refusing to consider or grant" a stay of proceedings under Ind. Rules of Procedure, Trial Rule 62(B)(1) pending disposition of the motion to correct errors and further appellate proceedings. He alleges the court ruled a motion for stay was not available in custody matters and therefore the trial court abused its discretion in refusing to even consider a stay. The record does not reflect such a ruling by the trial court, but only contains an entry denying Ronald's motion.

Suffice it to say that in child custody proceedings the welfare and best interests of the children are of paramount importance. Any stay of enforcement of a custody order would necessarily consider their best interests. *State ex rel. Winkler* v. *Superior Court of Marion County*, (1967) 248 Ind. 424, 229 N.E.2d 648. The testimony on this issue was presumably received during the custody hearing, held before Ronald's request for a stay, and was duly considered by the judge in rendering the custody order. It therefore appears another hearing on this issue would have been superfluous, in the absence of any evidence to the contrary. Additionally, Ronald did not challenge the court's decision to award custody of the three children to Susan, but only challenged the court's jurisdiction. We must defer to the trial court's determinations involving

the best interests of the children. The trial court's denial of Ronald's motion for a stay of enforcement of the custody order is affirmed. This Court previously denied Ronald's motion for a stay pursuant to Ind. Rules of Procedure, Trial Rule 62(D)(1); we affirm that ruling.

That portion of the trial court's order distributing the marital property is reversed. The judgment is affirmed in all other respects.

CONOVER and YOUNG, JJ. CONCUR.

Order of the Supreme Court of Indiana under date of August 10, 1982

No. 1-1080A310

In Re: The Marriage of
Susan Hudson and
Ronald R. Hudson

You are hereby notified that the Supreme Court has on this day denied Appellant's (Ronald) "Petition for Transfer."

Givan, C. J. All Justices Concur.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court,
this 10th day of August, 1982.

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

Order of the Court of Appeals of Indiana under date of May 26, 1982

No. 1-1080A310

In Re Marriage of
Susan Hudson
and
Ronald R. Hudson

You are hereby notified that the Court of Appeal has on this day Appellants petition for Rehearing Denied.

Buchanan,C.J.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 26th day of May, 1982.

/s/ Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

Dissolution of Marriage Decree

STATE OF INDIANA
VIGO SUPERIOR COURT

IN RE: THE MARRIAGE OF SUSAN HUDSON
AND RONALD HUDSON

CAUSE NO. S-C-80-377
DIVISION 2

DISSOLUTION OF MARRIAGE DECREE

This cause having been taken under advisement by the Court and the Court now being advised,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the marriage of Susan Hudson and Ronald Hudson is dissolved.

2. That Susan Hudson shall have custody of the three minor children of the parties and Ronald Hudson is ordered to return said children to Susan Hudson on or before August 1, 1980.

3. That Ronald Hudson shall pay to Susan Hudson for the support of said three minor children the sum of Forty Dollars ($40.00) per week per child, commencing July 21, 1980.

4. That Ronald Hudson shall pay all reasonable medical, dental, orthodontal, optical and hospital expenses incurred on behalf of the three minor children.

5. That Ronald Hudson shall be entitled to reasonable visitation with the three minor children at his residence or other proper place for thirty (30) days during the minor children's school vacation and one (1) week at Christmas vacation. Ronald Hudson shall also be entitled to visit at all other reasonable times at the place of the children's residence. Further, the costs of transportation involved

in the visitation of the three minor children shall be furnished by Ronald Hudson.

6. Ronald Hudson is declared the owner of the real estate located in Bremerton, Washington, and in Tualitin, Oregon, free of any interest in Susan Hudson. Susan Hudson shall convey by Quit Claim Deed, her interest in said real estate to Ronald Hudson. Ronald Hudson shall take said real estate subject to any indebtedness thereon.

7. That Ronald Hudson is declared the owner of the 1978 Mercedes Benz automobile, subject to any and all indebtedness thereon.

8. That Ronald Hudson pay to Susan Hudson the amount of Thirty Thousand Dollars ($30,000.00); said amount shall be payable to Susan Hudson within six (6) months from date hereof.

9. That Susan Hudson is hereby declared the owner of certain household goods and furnishings, including the bedroom furniture, the living room furniture, the children's furniture, and any other items of her own personal property.

10. That Ronald Hudson is hereby declared the owner of certain household goods and furnishings, including his ski equipment, the wine apple press, the camping equipment and various other items of his own personal property.

11. The remaining items of personal property, including the eighteen (18) Hummels, the eighteen (18) Llardos, the art prints and the seascape painting, shall be divided equally between Susan Hudson and Ronald Hudson.

12. Ronald Hudson shall pay Susan Hudson's attorney fee in the amount of Fifteen Hundred Dollars ($1,500.00) within ninety (90) days from date hereof.

13. That Susan Hudson pay the costs of this action.

SO ORDERED, this 15th day of July, 1980

/s/ *Charles K. McCrory*

Charles K. McCrory, Judge

Motion to Dismiss

STATE OF INDIANA
VIGO SUPERIOR COURT
1980 Term

IN RE: THE MARRIAGE OF	)	
	)	CAUSE NO. SC-80-377
SUSAN HUDSON and	)	
	)	DIVISION 2
RONALD R. HUDSON	)	

MOTION TO DISMISS

Comes now respondent, Ronald R. Hudson, and appears specially herein for the sole purpose of contesting the jurisdiction of this Court over the person of the respondent and the subject-matter of this action and would show the Court:

1. That petitioner and respondent have been residents of the State of Washington until December 1979 and maintained a voting domicile in the State of Oregon.

2. That petitioner, Susan Hudson, came to Indiana on December 26, 1979.

3. That the parties own real estate and have other property located in the State of Washington.

4. That the children of the parties are presently residing with respondent, Ronald R. Hudson, in Rota, Spain, and respondent was served by certified mail on March 24, 1980 in Rota, Spain.

5. That the petitioner has not been a resident of the State of Indiana for more than six months prior to the filing of this action and the parties are not and have not been residing in the marital relationship in the State of

Indiana, but have been residents of either the State of Washington or Oregon.

6. That this Court does not have subject-matter jurisdiction due to the lack of residence by either of the parties and the service of summons upon respondent in Spain is ineffective to give this Court in personam jurisdiction over respondent in the State of Indiana.

WHEREFORE, respondent, Ronald R. Hudson, moves the Court to dismiss this action for lack of subject-matter and in personam jurisdiction and for all other appropriate relief.

ROSENFELD, WOLFE, FREY & HUNT
By /s/ *Eric A. Frey*
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Brief in Support of Motion to Dismiss

STATE OF INDIANA
VIGO SUPERIOR COURT
1980 TERM

IN RE: THE MARRIAGE OF	)	
	)	CAUSE NO. SC-80-377
SUSAN HUDSON and	)	
	)	DIVISION 2
RONALD R. HUDSON	)	

BRIEF IN SUPPORT OF MOTION TO DISMISS

Comes now the Respondent, Ronald R. Hudson, by counsel, appearing specially herein for the sole purpose of contesting the jurisdiction of this Court over the person of the Respondent and the subject-matter of this action and submits this brief in support of its motion to dismiss filed herein on April 11, 1980.

I. JURISDICTION FOR DISSOLUTION OF MARRIAGE

Petitioner filed on March 12, 1980, her Verified Petition for Dissolution of Marriage which alleged that the parties hereto were married on the 18th day of January, 1975, and separated on or about the 25th day of December, 1979. Also alleged is that Petitioner has been a resident of Vigo County for more than three (3) months and has been a resident of the State of Indiana for more than six (6) months preceding the filing of said petition. Sworn testimony from Mrs. Hudson in reply to questions asked by her attorney were to the effect that they were married in Indiana, that she is registered to vote in Indiana and that she has always maintained an Indiana driver's license.

Mrs. Hudson's testimony on cross-examination revealed that she and her husband departed this State for Iceland approximately one and one-half years after their marriage in Bloomington, Indiana. Attached hereto and hereby made a part hereof is an affidavit of Eric A. Frey which has been marked Exhibit "A." This testimony is corroborated by Exhibit 1 thereto, which is a statement of Respondent, Ronald R. Hudson. Answers elicited on cross-examination also reveal that Mrs. Hudson *did not register to vote in Indiana until 1980.* As to the Indiana driver's license, this Court can take judicial notice of the laws of Oregon and Washington pursuant to I.C. 34-3-2-1 through 7, commonly known as The Uniform Judicial Notice of Foreign Law Act. Pursuant to I.C. 34-3-2-2 and 4, Respondent could show this Court that Petitioner's practice of maintaining an Indiana driver's license after being physically within the boundaries of Washington and Oregon for the periods of time in which such was the case is a violation of the law of each of those states—such evidence certainly being proper for consideration as to the truthfulness and veracity of Petitioner, such evidence also being properly admissible for impeachment purposes as to Petitioner's utterances as to her intent. Only the time constraints herein imposed by the Court on the submission of this Brief prevent Respondent's attorneys from being able to attach hereto true and correct copies of the aforementioned laws.

Along these same lines, Exhibit 1 to Exhibit A shows that there exists a geniune question as to the accuracy of Petitioner in starting in paragraph 3 of her *Verified* Petition for Dissolution of Marriage that "the parties were married on the 18th day of January, 1975." Respondent contends, and the couple's marriage certificate would prove, that the marriage took place on January 24, 1975—not January 18, 1975 as stated by Petitioner under oath.

I.C. 31-1-11.5-6 is the residence and venue portion of The Indiana Dissolution of Marriage Act and requires that the Petitioner be "a resident of the State or stationed at a United States military installation within the State for Six (6) months immediately preceding the filing of each petition." *In Re: Marriage of Rinderknecht,* (1977) 367 N.E. 2d 1128 is the latest judicial pronouncement from an Indiana appellate Court as to the test for obtaining jurisdiction to change the status of married persons.

Respondent (hereinafter "Husband") contends that neither he nor Petitioner (hereinafter "Wife") were residents of Indiana for the six (6) months prior to March 11, 1980—the date the dissolution petition was filed. Therefore, Husband contends the state residence requirement of I.C. 31-1-11.5-6 was not met and this Court did not have jurisdiction over the parties or their marriage. *Rinderknecht,* at 1131, cites *Board of Medical Registration and Examination* v. *Turner,* (1690) 241 Ind. 73, 79-80, 168 N.E. 2d 193, 3, wherein the Indiana Supreme Court defined residence as follows:

> It is the general rule in construing a statute which prescribes residence as a qualification for the enjoy ment of a privilege, or the exercise of a franchise, that domicile and residence are deemed to be equivalent or synonymous, i.e., that the word residence is deemed to mean domicile. . . .
>
> The term domicile in a strict legal sense has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which place he has, whenever he is absent, the intention of returning. Ballentine Law Dictionary, P. 400. To acquire a domicile of choice, there must be an actual residence in a particular place together with an intention to remain there. A place cannot serve as a domicile merely by force of bodily presence there when it is unaccompanied by an intention to live there per-

> menently, or at least indefinitely. 11 I.L.E., 'Domicile,' subsection 2, P. 3. As distinguished from domicile, residence may be any place of abode or dwelling regardless of how temporary . . .

Rinderknecht conclusively establishes that the two most important indicators of domicile (or residence) is physical presence and, as the Indiana Court of Appeals said at 1132, "an intention to return" to the place where domicile (or residence) is alleged to exist. Thus, without Husband physically residing in the State for the past six (6) months, he cannot be a resident of or domiciled in Indiana. The other part of the two-prong test—an intention to return to Indiana—is absent in the case of Wife. When pressed further by the Court from the bench on April 11, 1980, Wife, in essence, stated that she came to Indiana in July of 1979 to accompany some personal property that was being shipped here and returned to Oregon in December of 1979 to, as she put it, "try to work things out and make a go of it." If the Court will recall, this is the statement that caused the Court to correctly question Wife's domicile--based on the succinctly put, but correctly stated, premise that domicile (and residence) is rightly tested by "where one hangs his or her hat."

Exhibit 1 to Exhibit A presents further evidence of (1) factual indications leading to the conclusion that Husband was not a domicillary or resident of Indiana at any time subsequent to his departure from this State in 1976, and (2) Wife has not expressed an intent to make Indiana her permanent home—as evidenced by her admissions to a party to this action and her own admission from the witness stand—continuously within the last six (6) months preceding the filing of her petition in this action. *Rinderknecht* states at 1132: "Therefore, we determine the Indiana rule to be that the domicile of the Wife follows that

of the Husband, unless she, with the requisite physical presence *and intent, chooses another domicile.*" (Emphasis added.) Thus, only one conclusion is clear—and that is inescapable for this Court—that is, neither Husband nor Wife has been a resident within the meaning of I.C. 31-1-11.5-6 of the State of Indiana for the six (6) months immediately preceding March 11, 1980. Accordingly, this Court does not have jurisdiction to dissolve this marriage. Accordingly, this Court does not have subject-matter jurisdiction of the action as filed.

II. AWARD OF CUSTODY

Wife filed on March 12, 1980, a Motion for Emergency Custody. I.C. 31-1-11.5-20 does allow a child custody proceeding to be commenced pursuant to the filing of a petition for dissolution of marriage. However, I.C. 31-1-11.5-20 states: "Jurisdiction of a child custody proceeding either under this section or I.C. 31-1-11.6 *shall be pursuant to I.C. 31-1-11.6.*" The jurisdiction section of I.C. 31-1-11.6 is part 3 thereof. Husband would submit that this Court is not competent to decide a child custody matter herein under any of the four conditions giving jurisdiction under part (a) thereof:

(1) Indiana is not the home state, as defined in I.C. 31-1-11.6-2(5), of the children in question on March 12, 1980 because they did not live with a parent in Indiana for at least six (6) consecutive months prior thereto;

(2) Subpart (a) is not met because Wife does not have a significant connection with Indiana under the test for significant contacts under *Rinderknecht* set forth at 1133-36, and, even if the Court finds that such a significant connection with this state

does exist on behalf of Wife, the second prong (i.e. subpart (b)) of the two-part test is not met because there is not "available in this state substantial evidence concerning the (children's) present or future care, protection, training, and personal relationships" in Rota, Spain;

(3) Jurisdiction under this paragraph can only be found if the children are physically present in this State, a defect which is admitted on the face of the motion and petition and is fatal to jurisdiction under this paragraph; and

(4) Jurisdiction cannot be had under this paragraph either because one or the other or both of Washington and Oregon would have jurisdiction of a child custody dispute, and no state has declined to exercise such jurisdiction on the ground that Indiana is the more appropriate forum.

Another item should be noted by the Court. Wife's motion filed herein was not made under oath as required by I.C. 31-1-11.6-9 and does not contain each and every item required thereunder. While at first blush this may seem to be a technical defense raised by Husband, and examination of the text of said statutory section can only lead to the conclusion that the Indiana General Assembly was protecting valid interests when such requirements were enacted into law and that they did not intend for Courts in this State to ignore those requirements.

In the light of the decision in *Rinderknecht*, it is clear that the judiciation of the incidences of marriage, that is, affecting a nonresident respondent's interest in property, providing for *child support, visitation, etc.*, is historically contained in a dissolution of marriage proceeding. *Rinderknecht* at 1133. In adjudicating the incidences of a mar-

riage, Courts have been required to obtain *in personam* jurisdiction over both parties. *Id.* citing *Estin* v. *Estin*, (1948) 334 US 541, 68 Supreme Court 1213, 92 L.Ed. 1561. In order to meet the due process requirements of fair and substantial justice, there must exist certain minimum contacts between Indiana, the property or right sought to be terminated, and the litigation. *Id.* As stated in *Shaffer* v. *Heitner*, (1977) ..... U.S. ....., 97 S.Ct. 2569, 53 L.Ed.2d 683: "The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe*" The United States Supreme Court concluded "that all assertions of State Court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 97 S.Ct. 2584-85.

The Indiana Court of Appeals concluded in *Rinderknecht* at 1134 "(T)he requirement that a court must obtain *in personam* jurisdiction prior to adjudicating the rights and obligations which are incidences of a marriage will remain unchanged." The opinion goes on to read at 1134:

> It has always been held that the residency alone of petitioner in a dissolution of marriage proceeding does not provide a sufficient contact to give a court *in personam* jurisdiction over a nonresident respondent. However, the residency of the petitioner in a dissolution proceeding, without anything more, has been consistently upheld as a sufficient contact to enable a court, through an *in rem* proceeding, to change the marital status of the parties from married to unmarried. Does the dual nature of a dissolution proceeding become unified because the minimum contact test is applied to both *in rem* and *in personam* proceedings? We hold that it does not.
>
> In applying the minimum contact test to a dissolution of marriage proceeding a court must ask two

questions: (1) What are the minimum contacts between the forum state and the interests of the parties in their marriage which must necessarily be found before a court of the forum state can change the marital status of the parties? (2) What are the minimum contacts between the forum state and the parties, which must be found before a court of the forum state can adjudicate the rights and obligations which are incidences of the marriage of the parties?

Since two different types of actions are involved in a dissolution proceeding, two levels of minimum contact may be found sufficient to meet the requirements of "Fair play and substantial justice" which are inherent in the minimum contact test. Therefore, as to the changing of the status of the parties, the minimum contact test with its inherent notions of fair play and substantial justice, may be met by requiring only the residency of one of the parties, and we hold that it is so met. At the same time, the contacts necessary to satisfy the minimum contact test prior to obtaining *in personam* jurisdiction for the purpose of adjudicating the incidences of marriage may, as it traditionally has, require something more, and we hold that it does.

It is true that *Rinderknecht* once and for all decides that the residency of one of the parties to the marriage is sufficient to meet the minimum contact test so as to allow an Indiana trial court to obtain jurisdiction to change the status of married persons. *Rinderknecht* at 1135. Nevertheless, in the case at bar, just as in *Rinderknecht*, the question arises as to whether the Vigo Superior Court ever obtained *in personam* jurisdiction over Husband. It may be correct that Husband received actual notice of the Indiana dissolution proceeding by certified mail, return receipt requested. However, as stated in *Rinderknecht* at 1135, "before the required due process can be satisfied, a party must not only be given actual or constructive notice, but . . . there must exist certain "minimum contacts"

between a state and a party over whom a court of that State seeks to exercise control." (Footnote omitted.)

The opinion in *Rinderknecht* goes on to read:

> The minimal contact requirement for obtaining *in personam* jurisdiction in a dissolution proceeding is always satisfied, if the defendant is a resident of Indiana. If he is a nonresident, then the minimal contact requirement can be met in two ways: (1) if the requirements of Ind. Rules of Procedure, Trial Rule 4.4(A) (7) or some other constitutionally acceptable minimum contact are met, or (2) if the nonresident appears and fails or refuses to assert the trial court's lack of *in personam* jurisdiction in a timely manner. (Footnotes omitted.)

In the case at bar it is clear that Husband is a resident of some other state other than Indiana. Therefore, unless he comes within the minimal contact language of TR4.4 (A)(7), or unless he appeared and waived any issue as to personal jurisdiction, then this Court does not have *in personam* jurisdiction over him and cannot, therefore, adjudicate the incidences of the parties' marriage. *Rinderknecht* at 1136.

Just as in *Rinderknecht*, Trial Rule 4.4 (A) (7) is *not* broad enough in its scope to encompass the situation which is present in the case at bar. There is no evidence before the Court which would support a finding that the current action arises from living in the marital relationship within Indiana because the sworn testimony from the witness stand conclusively showed that neither party to the marital relationship *did not continue* to reside in Indiana.

Since there are not sufficient minimum contacts to permit the application of Trial Rule 4.4 (A) (7) in the case at bar, and if this Court is to have *in personam* jurisdiction over Husband, it must be found that Husband appeared and failed to assert in a timely matter this Court's lack of *in personam* jurisdiction. No such waiver can possibly be

found in this case in view of the Special Appearance and Motion to Dismiss filed herein on behalf of Husband on April 11, 1980. The prayer of Husband's motion unequivocally raises both the lack of subject-matter and *in personam* jurisdiction.

In passing, Husband would in the alternative, submit that if the Court does find that it has both subject-matter and *in personam* jurisdiction over Husband, Husband would have this Court read and consider the affidavit of Eric A. Frey, marked Exhibit "B" attached hereto and hereby made a part hereof in determining any facts appropriate to the subsequent entry of an order regarding custody, temporary maintance of Wife or support of children.

III. SUMMARY AND CONCLUSION

From the foregoing it can be seen that Vigo Superior Court did not ever obtain *in personam* or subject-matter jurisdiction over Husband. Therefore, this Court has no jurisdiction or authority to (1) dissolve the marriage of the parties or (2) enter any decree affecting the incidences of the marriage—namely, custody, support or maintenance. Accordingly, Husband would have this Court dismiss the action at Petitioner's costs and for all other relief prayed for in his motion to dismiss.

Respectfully submitted

ROSENFELD, WOLFE, FREY & HUNT
By */s/ William M. Olah*
William M. Olah
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(Affidavit and Exhibits omitted)

Order of Judge Charles K. McCrory under date of April 23, 1980

STATE OF INDIANA
VIGO SUPERIOR COURT

IN RE: THE MARRIAGE OF SUSAN HUDSON AND RONALD R. HUDSON

NO. S-C-80-377
DIVISION 2

ORDER

Court now being advised, and having examined the briefs now OVERRULES Respondent, Ronald R. Hudson's Motion to Dismiss.

SO ORDERED this 23rd day of April, 1980.

/s/ *Charles K. McCrory*
Charles K. McCrory, Judge

Motion to Correct Errors

STATE OF INDIANA
VIGO SUPERIOR COURT
1980 TERM

IN RE: THE MARRIAGE OF)	
)	CAUSE NO. SC-80-377
SUSAN HUDSON and)	
)	DIVISION 2
RONALD R. HUDSON)	

MOTION TO CORRECT ERRORS

Comes now respondent, Ronald R. Hudson, by counsel, and respectfully moves the Court, pursuant to Trial Rule 59, I.R.P., to correct the following errors occurring in this cause:

1. That the trial Court erred in denying respondent's motion to dismiss this action for lack of jurisdiction over the person of respondent and the subject-matter of the action filed herein on April 17, 1980.

2. That the trial Court erred in entering its findings of fact, conclusions of law and dissolution of marriage decree in this cause for the reason that this Court does not have jurisdiction over the person of the respondent or the subject-matter of this action.

3. That the Court erred in denying respondent's motion for a stay of proceedings under Trial Rule 62(B)(1) for the reason that the Court refused to consider the granting of a stay of its decree of dissolution of marriage pending the filing and disposition of a motion to correct errors and refused to consider any security or other conditions to ascertain that the motion to correct errors would, in

fact, be filed and proceedings had thereon, and petitioner protected during such period.

4. That the Court abused its discretion under Trial Rule 62(B)(1) in refusing to consider any possible stay of proceedings under Trial Rule 62(B)(1) or to consider the setting of any bond or other security in order to stay the execution of proceedings under the Court's dissolution decree.

5. That the Court erred in determining that it had jurisdiction over the subject-matter of this action and the person of respondent under either the Indiana Dissolution of Marriage Act or the Uniform Child Custody Jurisdiction Act for the reason that the petitioner did not come to Indiana until December of 1979 and commenced this action less than six (6) months after coming to Indiana, and for the further reason that at the time petitioner commenced this action, the children did not reside in the State of Indiana nor have a substantial and significant connection with the State of Indiana, and the evidence concerning the children's present and future care, protection, training and personal relationships were concerned principally with the States of Oregon and Washington and Rota, Spain, where they presently reside. The two children, who were the subject of the custody dispute in this case, resided in the State of Washington with their parents until the respondent was transferred to Rota, Spain with the United States Navy. In December of 1979, they came to Indiana with the petitioner to visit her parents prior to going to Rota, Spain. After petitioner decided she did not want to go to Spain with respondent, but instead wanted a dissolution of her marriage, the respondent proceeded to Rota, Spain, and subsequently returned to Indiana and took the children to Rota, Spain with him. Thereafter, this proceeding

was commenced at a time when the children did not live in or have any connection with the State of Indiana, and jurisdiction under the Uniform Child Custody Act is wanting in this case.

6. That the Court erred in failing to make specific findings under the Indiana Uniform Child Custody Act, I.C. 31-1-11.6-1 et seq.

ROSENFELD, WOLFE, FREY & HUNT

By /s/ *Eric A. Frey*
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Order of Judge Charles K. McCrory under date of September 25, 1980

IN RE: THE MARRIAGE OF SUSAN HUDSON AND RONALD R. HUDSON

CAUSE NO. S-C-80-377
DIVISION 2

ORDER

Court being advised now OVERRULES Respondent, Ronald R. Hudson's Motion to Correct Errors. Court further OVERRULES Respondent, Ronald R. Hudson's Motion for Stay of Proceedings.

SO ORDERED, this 25th day of September, 1980.

/s/ *Charles K. McCrory*
Charles K. McCrory, Judge

Petition for Transfer

IN THE

SUPREME COURT

OF THE

STATE OF INDIANA

NO. 1-1080 A 310

IN RE: THE MARRIAGE OF	)	Transfer from the
	)	Indiana Court of
SUSAN HUDSON and	)	Appeals, First
	)	Division
RONALD R. HUDSON	)	

PETITION FOR TRANSFER

Appellant, Ronald R. Hudson, respectfully petitions the Court to transfer this cause to the Supreme Court of Indiana for review pursuant to Appellate Rule 11(B), I.R.P., and would show the Court:

1. That the Court of Appeals of Indiana decided this case with a written opinion filed April 21, 1982.

2. That the opinion of the Indiana Court of Appeals decided issues adverse to appellant with respect to the issue of custody of the three minor children of the parties to this appeal.

3. That appellant timely filed his petition for rehearing before the Court of Appeals of Indiana on May 10, 1982, which petition for rehearing was denied on the 26th day of May, 1982.

4. That the opinion of the Court of Appeals is in error in the following particulars:

(a) That the opinion of the Court of Appeals contravenes a ruling precedent of the Indiana Supreme Court, and there is a conflict between the opinion and prior decisions of the Court of Appeals in the following particulars:

(i) That appellee failed to establish that she was a resident of Indiana and failed to establish jurisdiction under I.C. 31-1-11.5-6. See also *Curtis* v. *Curtis* (1891), 131 Ind. 489, 30 N.E. 18; *In Re Marriage of Rinderknecht* (1977), ... Ind.App. ....., 367 N.E.2d 1128; *Board of Medical Registration and Examination of Indiana* v. *Turner* (1960), 241 Ind. 73, 168 N.E.2d 193.

(b) That the Court of Appeals found that the trial court lacked *in personam* jurisdiction but proceeded to find that Indiana acquired jurisdiction under the provisions of the Uniform Child Custody Jurisdiction Act ("UCCJA"). This is an issue of first impression for the Supreme Court of Indiana, and the Court of Appeals concluded that jurisdiction under the UCCJA was present under the "significant connections" test since admittedly Indiana did not have jurisdiction under the "home state" test. The Court of Appeals erred in interpreting "significant connection" to be applicable where the children had been *removed from their home state.* The fallacy of the Court of Appeals' position is apparent when the Court acknowledged that Indiana was not the home state for these children, they were only present in Indiana for one and one-half months and the information regarding their present and future care required an analysis of their present living conditions in Spain or a review of their previous years of residence in the States of Washington and Oregon. The Court further erroneously found that the parties had permanently left Washington when the evidence demonstrated they still owned a home in Washington, had consistently claimed the

State of Oregon as their residence and a dissolution of marriage proceeding is presently pending in Oregon which can resolve all of the issues in this litigation.

(c) The decision of the Court of Appeals was also contrary to previous decisions of the Court of Appeals of Indiana in *State ex rel Marcrum* v. *Marion County Superior Court* (1980), ... Ind.App. ....., 403 N.E.2d 806 and *In Re Marriage of Cline* (1982), ... Ind.App. ....., 433 N.E.2d 51.

(d) Appellant would further show the Court that the decision of the Court of Appeals violates his due process rights under the constitutions of the State of Indiana and the United States of America. See *Estin* v. *Estin* (1948), 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561; *International Shoe Company* v. *Washington* (1945), 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95; *Hanson* v. *Denckla* (1959), 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283.

5. Appellant would further show the Court that he has never consented to jurisdiction in these proceedings, and the record clearly establishes that he is a member of the armed services of the United States of America. For this reason, this Court should defer jurisdiction to the courts of the State of Oregon where appellee has sought relief and will be bound by the rulings of the courts of said state. Under the Soldiers and Sailors Relief Act, it is inappropriate for the Court of Indiana to proceed to determine the issues in this litigation.

6. Finally, appellant would show this Court that oral argument was held in this cause before the First Division, and the decision was made by the Court of Appeals of Indiana for the Fourth District. Appellant submits that once argument is had before one division of the Court of

Appeals, it is erroneous to allow another division to proceed to issue an opinion on the issues which were argued.

WHEREFORE, appellant, Ronald R. Hudson, respectfully petitions this Court to grant transfer of this cause to the Supreme Court of Indiana, that this Court correct the errors of the Court of Appeals and for all other appropriate relief.

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No. 82-793

In the Supreme Court of the United States

OCTOBER TERM, 1982

RONALD R. HUDSON,

Petitioner,

vs.

SUSAN HUDSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I. TABLE OF CONTENTS

		PAGE
I.	Table of Contents	i
II.	Table of Authorities	ii
	A. Cases	ii
	B. Statutes	ii
	C. Legal Periodicals and Books	ii
III.	Statement of the Case	1
IV.	Summary of Argument	2
V.	Argument	3
VI.	Conclusion	6

II. TABLE OF AUTHORITIES

A. *Cases*

PAGE

In re Marriage of Hudson, ... Ind.App. ....., 434 N.E.2d 107 (1982) 4

Shaffer v. Heitner, 433 U.S. 186 (1977) 3

Kulko v. Superior Court of California, 436 U.S. 84 (1978) 3, 5

May v. Anderson, 345 U.S. 528 (1953) 3, 4, 5

Pasqualone v. Pasqualone, 63 Ohio St.2d 96, 406 N.E.2d 1121 (1980) 6

State ex rel Muirhead v. District Court of First Judicial District, 196 Mont. 535, 550 P.2d 1304 (1979) 6

B. *Statutes*

UCCJA, IC 31-1-1-11.6-1 *et seq.* ..... *passim*

C. *Legal Periodicals and Books*

Garfield, *The Absent Parent's Due Process Rights in Interstate Custody Conflicts: A Commentary on Marriage of Hudson*, to be published 16 Ind.L.R. (1982) 4

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III. STATEMENT OF THE CASE

Pursuant to Rule 34.2 of the Rules of the Supreme Court of the United States, this Statement of the Case is made specifically for the purpose of correcting an inaccuracy in Petitioner's Statement of the Case. Respondent specifically disagrees with Petitioner's statement that Petitioner (hereinafter "Husband") moved the two natural children of the parties to Rota, Spain, with him, after receiving repeated complaints from Respondent (hereinafter

"Wife") that she was unable to properly care for them (Pet. Br. 5). Nowhere in the record of proceedings, the transcript or the Court of Appeals Decision is there any evidence of "repeated complaints from Wife that she was unable to properly care for them." In fact, the recitation of the facts in this case by the Indiana Court of Appeals refers in two separate places to Husband's forcible and unilateral removal of these children from Indiana on March 12, 1980 (App. Pet. Br. 3, 15). Husband has not challenged the Trial Court's decision to award custody of the three children to Wife, but has only challenged the Court's jurisdiction.

IV. SUMMARY OF ARGUMENT

The decision below was in accordance with the body of law that has held that personal jurisdiction is not required in a child custody determination under the Uniform Child Custody Jurisdiction Act (hereinafter "UCCJA"). Furthermore the decision below has not removed the fundamental protection of due process afforded Husband under the Fourteenth Amendment of the United States Constitution. There is no question of law at issue that justifies the grant of a writ of certiorari here.

V. ARGUMENT

In holding that custody is in effect an adjudication of a child's status, the Indiana Court of Appeals relied on the status exception as enunciated in *Shaffer* v. *Heitner*, (1977) 433 U.S. 186. (App. Pet. Br. 20). Jurisdiction under the UCCJA is centered around the paramount issue of the best interests of the child, not the feuding parents. Therefore, the Uniform Act focuses primarily on the State where the child and family, not a single parent, maintain significant connections. Using this rationale, the Court of Appeals in Indiana found that the UCCJA's jurisdictional provisions aligned with the requirements of *Shaffer* (App. Pet. Br. 23). In fact, assumption of jurisdiction by a forum meeting the jurisdictional requirements of the UCCJA satisfies the traditional notices of fair play and substantial justice which are embodied in the due process clause.

Petitioner seeks review of this case because of the supposed existence of totally conflicting State Court decisions on this issue and relies primarily on the following three decisions rendered by this Court, *Kulko* v. *Superior Court of California*, 436 U.S. 84 (1978), *Shaffer* v. *Heitner*, *supra* and *May* v. *Anderson*, 345 U.S. 528 (1953). It is not only unnecessary in the case at bar to further define the precise scope of this doctrine, but *Kulko* and *May* may not even be applicable. The decision in *May* is specifically limited to cases where "child snatching" is not involved, thus it is clearly distinguishable from the case at bar. A footnote in *May* v. *Anderson*, 345 U.S. 528, 535 n. 8 (1953) states:

> . . . The instant case does not present the special considerations that arise where a parent, with or without

minor children, leaves a jurisdiction for the purpose of escaping process or otherwise evading jurisdiction, and we do not have here the considerations that arise when children are unlawfully or surreptitiously taken by one parent from the other.

Even if *May* does apply, the UCCJA should be interpreted as permitting long-arm jurisdiction. *May* is a plurality opinion which has enjoyed little acceptance. When *May* was decided, it was mostly true that *in personam* jurisdiction could be acquired only by personal service of summons within the State. However, the expansion of long-arm jurisdiction after 1953 lessened the impact of *May* on custody jurisdiction, and it was during this period that the UCCJA was drafted. For the most part the drafters ignored the due process implications of *May* and treated custody jurisdiction as purely *in rem*. The dilemma in *May* is compelling evidence that the complexity of interstate custody jurisdiction problems is not susceptible to solution by constitutional fiat. Eventually the UCCJA redefined the bases of custody jurisdiction, and this legislation now governs child custody jurisdictions in forty-eight states. See Garfield, *The Absent Parent's Due Process Rights in Interstate Custody Conflicts: A Commentary on Marriage of Hudson*, to be published, 16 *Ind. L.R.* N2 (1982).

When the quotations from *May* relied upon by Petitioner are read in accord with Justice Frankfurter's concurring opinion, a very different picture is presented. Justice Frankfurter posited the plurality view of *permitting* states to recognize foreign custody decrees rendered without personal jurisdiction over an absent parent under local law but not *requiring* them to do so under the full faith and credit clause. *May* at 535-36. Respondent respectfully suggests that this is the more accepted view of *May*

than Petitioner's argument that *May* requires that jurisdiction over the person must be obtained. (Pet. Br. 10).

Petitioner next relies upon *Kulko* v. *Superior Court of California,* 436 U.S. 84 (1978) and argues that this case stands for the proposition that due process requirements of minimal contacts and fundamental fairness are just as applicable to domestic relations as to commercial transactions. (Pet. Br. 14). *Kulko* is significant because it involved *in personam* jurisdiction in a domestic relations setting, although it is distinguishable from the instant case because it was concerned with jurisdiction over child support, rather than child custody. This Court in *Kulko* seemed to apply a more strict standard to child support cases than it applies in commercial cases. However, it does not necessarily follow that the higher standard would apply in all domestic relations cases. Domestic relations jurisdiction already covers the entire spectrum of standards for minimum contacts, from the most restrictive (child support) to the least restrictive (marital status).

With respect to child custody jurisdiction, it remains to be seen where the fine point along that spectrum should be drawn. Professor Garfield suggests that the Court should decline to fix the minimum contact standard for custody jurisdiction at either end of the spectrum. She contends that there are important differences between divorce and custody litigation. The absent parent has a far greater interest in custody than an absent spouse has in maintaining a marriage in limbo. At the other end of the spectrum, the distinction between child custody and child support is just as clear. A child support action is essentially a dispute over money, but in a non-commercial context, so that the Court found it necessary to apply a minimum contact standard more restrictive than that used in commercial cases. Further, the nature of support liti-

gation is such that it can be conducted more easily at long distances than custody litigation. In custody litigation, the child's interests in the availability of a forum and the state's obligation to provide such a forum are far greater than in support actions. Insofar as the minimum contacts test is concerned, the near-universal adoption of the UCCJA by the states suggests that there is agreement that this statute provides the best solution to the complex problems raised by custody litigation in a Federal system. See Garfield, *supra.*

Even if the minimum contacts requirement does apply, it may be persuasively argued that the child's significant "connection" to the state and the presence in the state of "substantial evidence" concerning the child are adequate. In effect, the child's contacts with the state would have to be attributed to the parent. In most cases this would not stretch the concept of minimum contacts too far, considering the great need of the child for a forum with authority to decide its custody, the duty of the state to provide such a forum, and the due process protection afforded the absent parent by the requirements of notice and opportunity to be heard. See Garfield, *supra.*

VI. CONCLUSION

It is respectfully submitted that Petitioner has wholly failed to sustain its burden of establishing that a state statute is repugnant to the constitution. Petitioner cites only two cases, *Pasqualone* v. *Pasqualone,* 63 Ohio St. 2d 96, 406 N.E.2d 1121 (1980), and *State ex rel. Muirhead* v. *District Court of First Judicial District,* 196 Mont. 535, 550 P.2d 1304 (1979), to support its contention that there is a virtual smorgasboard of holdings on this issue. When viewed in the proper context, it is clear that there is not the totally conflicting State Court decisions as the Peti-

tioner suggests. The decision below correctly held that the Trial Court's assertion of jurisdiction over the custody proceeding without obtaining *in personam* jurisdiction over Husband did not violate his due process rights.

For all the reasons set forth above, it is respectfully submitted that Husband's petition for certiorari should be denied.

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